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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

THEODORE ERVIN STITH,

Defendant and Appellant.

A145434

(Solano County  
Super. Ct. No. FCR 190288)

Defendant Theodore Ervin Stith appeals from a judgment of conviction entered after a 2003 jury trial. His counsel on appeal has filed an opening brief that asks this court to conduct an independent review of the record, as is required by *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Counsel also informed Stith that he had a right to file a supplemental brief on his own behalf. Stith declined to exercise that right. We dismiss the appeal on the grounds that either (1) it is an untimely appeal of a 2004 resentencing or (2) if it is not untimely, Stith has failed to provide this court with an adequate record.

**I. BACKGROUND**

In 2003, a jury convicted Stith of (1) attempted murder (Pen. Code, § 187/664) (count one), (2) an attempted murder against a second victim (Pen. Code, § 187/664) (count two), (3) kidnapping (Pen. Code, § 207) (count three), (4) kidnapping of the second victim (Pen. Code, § 207) (count four), and (5) robbery (Pen. Code, § 211) (count five).

The trial court found Stith had two prior serious felony convictions, which are strikes, and served a prior prison term (pursuant to Pen. Code §§ 667, subd. (a)(1), 667.5,

subd. (a), 1170.12, subd. (c)(2)(A).). The court sentenced Stith to a total prison term of 167 years to life, plus a consecutive determinate term of 10 years.

On appeal in 2003, this court found there was insufficient evidence to support one of the two strikes and remanded the matter to the trial court for resentencing.<sup>1</sup> In 2004, the trial court judge resentenced Stith to a term of 53 years to life, plus a consecutive determinate term of 36 years. Stith did not file a notice of appeal from the resentencing order.

Ten years later, in 2014, Stith began to pursue an appeal on that resentencing. He contacted his trial counsel and sought appointment of the public defender. The public defender was appointed. Stith's public defender indicated to his appellate counsel that there were no proceedings in Superior Court after the appointment of the public defender in 2014.

In 2015, Stith asked our court for a copy of an order that he claims was filed on May 10, 2015 in Solano County, but the Solano County Clerk's office has found no record of such an order. Stith filed a notice of appeal based on this alleged 2015 order, but indicates in the notice of appeal that his intent is to challenge the 2004 resentencing.

In 2015, Stith moved to augment the record to include records related to his 2004 resentencing. This court denied the motion for lack of good cause. Weeks later, Stith renewed his request to augment. This court again denied the motion for lack of good cause.

## II. DISCUSSION

It is unclear whether Stith seeks to appeal from his 2004 resentencing or from an unknown order from 2015. Regardless, in either case, his *Wende* appeal fails and must be dismissed.

Stith's right to appeal his 2004 resentencing expired long ago. Under California Rules of Court, rule 8.308(a), a notice of appeal must be filed within 60 days of the order being appealed. "An untimely notice of appeal is 'wholly ineffectual: The delay cannot

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<sup>1</sup> See *People v. Stith* (Dec. 19, 2003, A102767) (nonpub. opn.).

be waived . . . and the appellate court has no power to give relief, but must dismiss the appeal on motion or on its own motion.’ ” (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094.) Assuming Stith’s appeal is a challenge to his 2004 resentencing, we must and do dismiss.

If Stith is appealing an unknown 2015 order, his appeal also fails. The county clerk was unable to find any record of such an order. But even if such a record could be found, there is no indication that Stith would be entitled to *Wende* review.

Not all orders are entitled to *Wende* review. In *People v. Serrano* (2012) 211 Cal.App.4th 496, 503 (*Serrano*), the Sixth District Court of Appeal held that a defendant is entitled to *Wende* review in “a first appeal of right” from a criminal conviction but is not entitled to such review “in subsequent appeals, including collateral attacks on the judgment.” (See also *People v. Martinez* (2016) 246 Cal.App.4th 1226, 1238; *People v. Kisling* (2015) 239 Cal.App.4th 288, 290.) The *Serrano* court concluded that such a subsequent appeal must be dismissed as abandoned if neither the defendant nor appointed counsel raises any claims of error. (*Serrano, supra*, at pp. 503–504.)

Here, Stith was resentenced in 2004. His case would only be entitled to *Wende* review if the alleged 2015 proceeding constituted a criminal conviction or resentencing, which would engender a new “first appeal of right.” (*Serrano, supra*, 211 Cal.App.4th at p. 503.) If the 2015 proceeding was anything other than a criminal conviction or resentencing, there is no right to *Wende* review. Yet Stith has offered no evidence to suggest that a 2015 proceeding took place—let alone that the 2015 proceeding constituted a criminal conviction or resentencing.<sup>2</sup> Without such evidence, we cannot find that he is entitled to *Wende* review.

### **III. DISPOSITION**

The appeal is dismissed.

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<sup>2</sup> It is the appellant’s burden to provide the court with a record sufficient for our review. (See *People v. Whalen* (2013) 56 Cal.4th 1, 85.)

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Streeter, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.